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IN THE
Supreme Court of the United States

DELBERT WILLIAMSON, *et al.*,
Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC., *et al.*,
Respondents.

On Writ Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice ["AAJ"], respectfully submits this brief as *amicus curiae*. The parties have filed letters of consent to the filing of amicus briefs.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits and personal injury actions, including those injured in automobile accidents as a result of dangerously designed vehicles. Throughout its 65-year history, the association has championed the fundamental right of every American to legal recourse for redress of wrongful injury. The lower court's decision in this case undermines this fundamental right.

Increasingly, as in this case, defendants in state tort actions seek immunity from state tort liability by invoking the doctrine of federal preemption. In too many instances, because federal safety regulation does not provide a private right of action, immunity from liability under state law deprives injured persons of any remedy at all.

AAJ views the decision below as an unwarranted denial of Americans' fundamental right to legal recourse for injury, based on little more than the court's interpretation of congressional silence or ambiguity.

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[1] Pursuant to Rule 37.6, *Amicus Curiae* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amicus Curiae*, its members, or counsel make a monetary contribution to its preparation.

SUMMARY OF THE ARGUMENT

1. The scope of preemption of state law by federal health and safety regulation has expanded due to efforts by business interests to use federal regulation as a shield against accountability under state tort law.

This case involves the death of a woman due to use of a seatbelt that was not reasonably safe in the event of an automobile crash. The lower court set aside the plaintiffs' state law cause of action for damages caused by unreasonably dangerous products. The court, relying on this Court's precedents, held that requiring automakers to compensate those they have wrongfully harmed "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the National Traffic and Motor Vehicle Safety Act.

The recent use of "obstacle" preemption to eliminate Americans' common law remedies for wrongful deaths and injuries expands the doctrine of preemption far beyond its constitutional foundation. The Founders designed the Supremacy Clause not to expand the powers of the Congress, but to direct judges to apply federal law regardless of conflicting state law. Consequently, preemption analysis requires an objective process of statutory construction on the part of a court. "Obstacle" preemption, properly applied to state laws that render it impossible for federal law to accomplish Congress's purposes, similarly requires a narrow and objective analysis.

The expanded "obstacle" preemption applied by the court below focuses on the court's subjective determination of congressional purposes and on speculative, rather than actual conflict. This opens the door to judicial policymaking.

2. State tort remedies for wrongful death and injury do not, in fact, conflict with federal safety regulation. Government regulation consists of mandatory requirements imposed upon private actors, such as automakers. A verdict in a product liability action imposes no requirement other than to compensate the injured plaintiff.

A verdict for plaintiffs in this case would not require the jury in a future similar case to return the same verdict. A verdict for plaintiffs may have an indirect regulatory impact in that a manufacturer may perceive a financial incentive to avoid similar outcomes in future cases by altering the design of his product. The manufacturer may adopt a different design. The manufacturer might rationally decide, considering the likelihood and severity of possible future harm, to compensate any future plaintiff. The critical feature is that potential liability is merely a financial incentive; the decision regarding product design remains with the private actor. Preemption is concerned with the exercise of governmental power, not governmental persuasion.

Broad preemption of state tort remedies would leave Americans entirely dependent upon federal administrative agencies to ensure product safety. Such agencies can bring valuable expertise to bear on safety issues, but they are not infallible. Many products have found their way to the marketplace

and have caused death and serious injury, despite compliance with applicable federal safety regulation.

In addition, tort liability actions often uncover information about product dangers that was not available to regulators prior to marketing. For this reason, liability actions and regulation have long been viewed as complementary efforts to protect the safety of the American public.

In this case, the Court need not speculate whether Congress intended tort remedies to coexist with the motor vehicle safety standards issued by NHTSA. The Safety Act explicitly provides that such regulations are "minimum" safety standards.

3. Expansive "obstacle" preemption of state tort remedies impinges upon the fundamental right of all Americans to legal remedy for wrongful injury. That right is grounded in the guarantee of due process and precludes the elimination of common law remedies for invasion of certain "absolute" rights without provision of an alternative substitute remedy. Congress has the ability to explicitly displace common law remedies where it so intends. Given the great importance of the right to seek legal recourse for injury, it cannot be assumed that Congress would have intended, impliedly and silently, to leave injured persons bereft of all remedy.

ARGUMENT

I. COMMON LAW TORT REMEDIES DO NOT PRESENT AN "OBSTACLE" TO THE CONGRESSIONAL PURPOSE OF SAFETY LEGISLATION.

A. Obstacle Preemption Has Become Unduly Expansive at the Behest of Corporate Interests Seeking Immunity from Accountability Under State Law for Causing Wrongful Injury and Death.

The law of preemption has in recent years become a battleground. The present case is part of a concerted and protracted effort by some business interests to escape accountability for tortious conduct resulting in injury or death. "With increasing frequency, corporations have attempted to turn [federal health and safety] statutes from regulatory swords into private shields, contending that the federal statutes preempt the recovery of damages under state tort law." Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*; 77 B.U.L. Rev. 559, 561 (1997). *See also*, Cindy Skrzycki, *The Chamber Reached a Sticking Point*, Wash. Post, Sept. 17, 1999, at E1 (describing efforts by the nation's largest business lobbying group to defeat legislation that would have curtailed the preemptive effect of federal statutes and regulations).

Many observers have viewed these efforts as an attack on the right of ordinary Americans to access to the courts for legal redress. State attorneys general, state legislatures, bar associations,

consumer advocacy groups and others have denounced the preemption of state tort remedies without explicit congressional authorization as "stealth tort reform" and a "sneak attack" on individual rights. Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DePaul L. Rev. 227, 255-56 (2007).

Despite this Court's repeated admonition that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," *e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), Americans' state tort remedies are often set aside. *See* Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 Sup. Ct. Econ. Rev. 43, 52 (2006) (During 1986 to 2004, of thirty-two cases involving preemption of state common-law tort claims; the Court found preemption in 62.5%.).

This case involves the most controversial expansion of preemption doctrine setting aside Americans' traditional common law remedies for wrongful injury, based on judicial determination that requiring wrongdoers to compensate those they have harmed "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The court below found that such "obstacle" preemption bars plaintiffs' state law causes of action in this case. *Williamson v. Mazda Motor of Am., Inc.*, 84 Cal. Rptr. 3d 545, 552 (2008).

Geier was the first case in which this Court applied "obstacle" preemption to state tort remedies for personal injury. The four dissenting Justices criticized "the Court's unprecedented extension of the doctrine of pre-emption" 529 U.S. at 886 (Stevens, J., dissenting), and warned against this "potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes." *Id.* at 907. Amicus suggests that this case offers an appropriate vehicle for the Court to set clear and narrow limits on "obstacle" preemption.

B. "Obstacle" Preemption Is Properly Restricted to Setting Aside State Laws That Would Actually Render the Achievement of the Purpose of Federal Law Impossible.

The Founders did not view federal preemption of state law as a problem, but as a solution. In our system of dual sovereignty, many activities are governed by national and state law concurrently, presenting courts with the choice of which law controls. The Constitution provides their answer. The doctrine of federal preemption of state law "has its roots in the Supremacy Clause." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982); *see also Wyeth v. Levine*, 129 S.Ct. 1187, 1205-07 (2009); *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008).

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall

> be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Constitutional Convention adopted the Supremacy Clause in its present form by unanimous consent after defeating a competing provision that would have given Congress the power to "negative" state laws. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2089-90 (2000) (summarizing the proceedings). The history as well as the plain text indicate that the Founders intended the Supremacy Clause for a limited purpose, "not as the repository of Congress's power to preempt state laws, but as a constitutional rule to resolve conflicts between state and federal laws." *Id.*

Thus, as Professor Nelson convincingly demonstrates, the Founders provided for preemption of state laws where there is actual—not merely potential or speculative—conflict. "Under the Supremacy Clause, then, the test for preemption is simple: Courts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law." Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 260 (2000). The essential feature of "obstacle" preemption, asking not whether state law contradicts the provisions of federal law but whether it frustrates the "full purposes and objectives of Congress," is not supported by the constitutional text of the Supremacy Clause.

As this Court has often stated, the intent of Congress "is the ultimate touchstone in every pre-emption case." *Wyeth*, 129 S.Ct. at 1194 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. at 485). In many circumstances, the inquiry is clearly defined, even if not easily answered. Where Congress has included an express preemption provision, the court's task is one of statutory interpretation and it "need only identify the domain expressly pre-empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992); *Lohr*, at 484. A court may find "field" preemption where Congress legislates in an area where federal interest is dominant or enacts a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also Fidelity Fed. Sav. & Loan Ass'n. v. de la Cuesta*, 458 U.S. at 153 (describing field preemption as a question of statutory construction).

Implied conflict preemption is similarly an objective matter of statutory construction that "is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Perez v. Campbell*, 402 U.S. 637, 644 (1971). As the text of the Supremacy Clause indicates, where it is logically impossible for the court to apply both federal and state law, the court must apply federal law. Such an analysis leaves no room for a court to interpose its own subjective policy views.

Professor Nelson argues that the Supremacy Clause looks to whether federal and state laws

present a "logical-contradiction" such that a court "would have to choose between them." Nelson, *supra*, at 260. Chief Justice Marshall's articulation of the preemption doctrine in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), confirms that only those state laws that completely contradict federal law must yield. Nelson, *supra*, at 266-72.

Because implied conflict preemption is not grounded in the statutory text, it is important for courts to confine their analysis to identifying objective contradiction between state and federal laws. They should not decide on the basis of subjective considerations concerning unstated congressional purposes or their "full" measure. To hold otherwise, "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). This Court has cautioned that, "courts should not assume the role which our system assigns to Congress." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 223 (1983). As the four dissenting justices in *Geier* more pointedly noted, "the Supremacy Clause does not give unelected federal judges carte blanche to use federal law as a means of imposing their own ideas of tort reform on the States." *Geier*, 529 U.S. at 894 (Stevens, J., dissenting).

"Obstacle" preemption poses just such a danger. This type of implied preemption was engrafted onto existing doctrine relatively recently. Its origins may be traced to this Court's decision in *Hines v. Davidowitz*, 312 U.S. 52 (1941). The Court

there held that a Pennsylvania law requiring aliens to register with state authorities, imposing more stringent requirements than imposed by federal law, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67.

The Court obviously intended that state law would be set aside only when enforcement of the state law would make it impossible—not merely more difficult—to enforce the federal law. "'[I]f the purpose of the act *cannot otherwise be accomplished* . . . the state law must yield.'" *Id.* at 67 n.20 (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912). Indeed, this Court has generally viewed "obstacle" preemption as a type of "impossibility" preemption. *See Geier*, at 873 ("The Court has not previously driven a legal wedge . . . between "conflicts" that prevent or frustrate the accomplishment of a federal objective and "conflicts" that make it "impossible" for private parties to comply with both state and federal law.")

The *Geier* majority did in fact indicate that a state law, including a common law right, may be set aside as an "obstacle" where it causes "a conflict" that would "defeat [the federal law's] own objectives." *Id.* at 872. The Court relied on *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), where Justice Scalia explained that a federal law "cannot in reason be construed as continuing . . . a common law right, the continued existence of which would be *absolutely inconsistent* with the provisions of the act," so that the federal law would "destroy itself." *Id.* at 227-28 (quoting *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204

U.S. 426, 446 (1907)) (emphasis added). In other words, "ordinary preemption principles" look to whether federal and state law "actually conflict," such that giving effect to the state law "would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives." *Geier*, at 872.

Unfortunately, this Court's somewhat open-ended formulation "invites the courts to hypothesize and analyze potential situations in which tort remedies might stand as an obstacle to or frustrate a congressional purpose. Thus, courts can find obstacles where none exist." Betsy J. Grey, *Make Congress Speak Clearly*, *supra*, at 624. The Fourth Circuit has stated:

> While preemption under a theory of express or implied preemption is essentially a matter of statutory construction, preemption under a frustration of federal purpose theory is more an exercise of *policy choices by a court* than strict statutory construction.

Abbot v. American Cyanamid Co., 844 F.2d 1108, 1113 (4th Cir. 1988) (emphasis added). As Judge Starr has pointedly observed, "When judges preempt state laws in the absence of explicit congressional guidance, they in effect assume a legislative role without accepting legislative responsibility." Kenneth Starr et al., *The Law of Preemption: A Report of the Appellate Judges Conference of the American Bar Association* 48 (1991).

In this case, as the Solicitor General has correctly stated, the lower court "gave too broad a

reading to this Court's decision" in *Geier*. Br. for the United States as *Amicus Curiae* in Supp. of Pet. at 8, *Williamson v. Mazda Motor of Am., Inc.*, No. 08-1314 (U.S. Apr. 23, 2010). The court held that the then-existing Federal Motor Vehicle Safety Standard 208, requiring that the minivan in this case be equipped with either a Type 1 or Type 2 restraint in the rear inboard seat was not a "minimum" standard, as provided 49 U.S.C. § 30102(a)(9). Rather, the court held that carmakers were entitled to the option of using either type, and that tort liability for death or injury caused by the less safe option would stand as an obstacle to these "important means-related federal objectives." *Williamson*, 84 Cal. Rptr. 3d at 552. As the Solicitor General noted, a number of other courts have similarly misinterpreted and misapplied the doctrine of "obstacle" preemption to deny state tort remedies to injured persons. Br. for the United States, *supra*, at 8.

Amicus suggests that application of the doctrine of implied "obstacle" preemption to state tort remedies that do not actually render it impossible to apply federal law is not grounded in the Supremacy Clause. This Court has stated that there is "no general, inherent conflict" between federal safety regulations and "the continued vitality of state common-law damages actions." *Cipollone*, 505 U.S. at 518. As the Court recently made clear, "the Court should look to the federal statute itself, rather than speculate about Congress' unstated intentions." *Wyeth*, 129 S.Ct. at 1213 n.4. It is clear that plaintiffs tort causes of action in this case are not in direct conflict with the minimum safety standard for passenger restraints issued by NHTSA.

II. STATE TORT REMEDIES FOR WRONGFUL INJURY DO NOT "CONFLICT" WITH FEDERAL MANDATORY STANDARDS OR REQUIREMENTS.

The judicial determination that tort remedies for personal injury "stand as an obstacle" to Congress's purpose in enacting the National Traffic and Motor Vehicle Safety Act rests on the notion that a jury verdict establishes a legal requirement or mandatory standard on a par with a mandatory federal standard or requirement under the Act. This is a false conflict, based on misunderstanding of tort law remedies.

A. The Regulatory Impact of Tort Liability Is Indirect and Is Not a State Governmental Requirement Subject to Preemption by Federal Law.

"[T]he purpose of compensatory damages," as Justice Blackmun pointedly observed, "is to compensate." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 263 (1984) (Blackmun, J., dissenting). A verdict in the Williamsons' favor in this case would support a judgment under state law ordering defendant to pay compensatory damages for the death of Thanh Williamson. But such a judgment would impose no requirement that Mazda make any change in any of its cars.[2]

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[2] The contrary view appears not to have been based on the effect of an award of damages, but on the possibility of unusual injunctive relief. Justice Stevens in the first oral argument in

As trial lawyers are well aware, a jury verdict in favor of the plaintiff in a products liability case, requires that the defendant compensate the plaintiff for the harm caused—but nothing more. *See* Philip H. Corboy & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 Am. J. Trial Advoc. 435, 455-57 (1992); Ralph Nader & Joseph A. Page, *Automobile-Design Liability and Compliance With Federal Standards*, 64 Geo. Wash. L. Rev. 415, 437-39 (1996).

A manufacturer might seek to avoid future liability in a future lawsuit by improving the design of its product, but it is not required to do so. The product may already have been taken off the market or replaced by a newer, safer model. The manufacturer may decide to address the hazard by a warning or by a different design change. It could

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Cipollone asked whether the trial court in that case—which sought damages based on failure to warn of the dangers of smoking—might impose such a requirement:

> And what if, [in addition to awarding damages] the court also granted an injunction against the future sale of cigarettes unless it had that warning on it?

Transcript of Oral Argument at 15, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (No. 90-1038). Plaintiff's counsel responded correctly that such an injunction is not available in product liability cases. *Id. See, e.g., National Women's Health Network, Inc. v. A.H. Robins Co.*, 545 F. Supp. 1177, 1181 (D. Mass. 1982). Nevertheless, Justice Stevens likely had such a circumstance in mind when he observed in *Lohr*, "It will be rare indeed for a court hearing a common-law cause of action to issue a decree that has the effect of establishing a substantive requirement for a specific device." 518 U.S. at 502-03 (plurality).

rationally decide, balancing the probability of future serious harm against the cost of eliminating the risk, simply to compensate any future victims.

In fact, most manufacturers sued for injury caused by their products do *not* change their product's design. Risk managers of Fortune 1000 corporations with actual product liability experience reported that as a result about 32 percent had improved the safety design of the product and about 37 percent had improved its labeling. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?* 42 U.C.L.A. L. Rev. 377, 408-09 (1994) (summarizing results reported in Nathan Weber, *Product Liability: the Corporate Response* 15 (1987).

At bottom, to the extent that product liability has a regulatory impact, it is an indirect one. It operates through private decisionmaking in the marketplace. By requiring the manufacturer to internalize the costs of injury as part of the price of the product, the potential for future liability creates a financial incentive for manufacturers to make their products reasonably safe. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973).

It is well-accepted that in a marketplace in which all actors have perfect knowledge of risks, the market itself would provide the most efficient allocation of resources to produce reasonably safe products. *See* Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: an Economic Justification for Enterprise Liability*, 76 Cornell L. Rev. 129, 161 (1990) (noting the wide acceptance of this proposition, known as the "Coase Theorem"). *See*

generally, Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960). Thus, an ideal market would favor products with the lowest sum of the cost of injuries plus the cost of injury prevention.

Of course, real-world markets do not provide perfect consumer information, and manufacturers are able to "externalize" the injury costs of their products. Guido Calabresi, *The Costs of Accidents* 144-45 (1970). That is, the manufacturer can force consumers, taxpayers, and society generally to subsidize its products by bearing part of the cost of the injuries caused by those products. This places the manufacturer who invests in safety, adding to the product's price, at a competitive disadvantage. Product liability rules, by assessing risk retrospectively, compensate for imperfect consumer information. W. Kip Viscusi, *Reforming Products Liability* 66 (1991) ("The purpose of products liability is to fill the gaps left by market imperfections and to replicate the incentives that would have been generated had markets been functioning perfectly.").

In this way, product liability lawsuits "promot[e] optimal deterrence—the taking of precautions and selection of activities that minimize the sum of accident costs and accident avoidance costs." Kenneth S. Abraham, *The Insurance Effects of Regulation by Litigation, in Regulation Through Litigation*, 212, 232 (W. Kip Viscusi ed. 2002). It is for the manufacturer to decide rationally whether it is cheaper to prevent future injuries by investing in safety precautions or simply to compensate future victims. *Id.* Product liability duties therefore reflect a policy of making dangerous products pay their own way by internalizing costs. *See* Stephen G. Breyer,

Regulation and Its Reform 175 (1982) (product liability rule seeks "to place costs upon the party best able to avoid them").

Government pursues product safety in a far different way. Regulation is premised on the belief that the marketplace cannot achieve the level of safety society demands. In many ways, safety regulation is the polar opposite of tort liability. Administrative regulations are prospective; tort liability assesses past conduct. Regulations may mandate specific design or performance standards; the tort standard is "the general duty of every manufacturer to use due care to avoid foreseeable dangers." *Lohr*, at 501.[3] Regulatory penalties can be imposed to enforce compliance; a liability verdict is measured by the amount necessary to compensate for wrongful death and injury. *See generally*, Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Stud. 357 (1984).

In his classic exposition, Judge Calabresi contrasts the indirect influence exerted on the market by tort law ("general deterrence") with governmental regulatory mandates ("specific deterrence"). Calabresi, *The Costs of Accidents*, *supra*, at 68-129. As one scholar summarized: "[U]nder a general deterrence regime, manufacturers, not government officials, make

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[3] The general duty imposed on product suppliers varies little among the states. James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867, 887 (1998) (the "overwhelming majority" of courts apply the same "risk-utility approach in determining design defects.").

decisions about product safety." Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syracuse L. Rev. 897, 927 (1988).

This Court has acknowledged this view. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) ("Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."); *English v. General Elec. Co.*, 496 U.S. 72, 85 (1990) (the effect of tort awards "is neither direct nor substantial enough to place petitioner's claim in the pre-empted field"); *Silkwood*, 464 U.S. at 257-58 (vesting federal agency "with exclusive regulatory authority over the safety aspects of nuclear development" was not inconsistent with allowing plaintiffs to recover for injuries caused by nuclear hazards). Justice Blackmun later described the import of these decisions: "The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations." *Cipollone*, 505 U.S. at 536-37 (Blackmun, J., dissenting in part).

In this case, if Mazda were held liable to the Williamsons for the death of Thanh Williamson due to the use of the unsafe lap-only belt, the company would be obligated to pay compensatory damages. The verdict and judgment would not require Mazda to install Type 2 seatbelts in the rear inboard seating position. If Mazda chose to do so, it would not be relieved of its obligation to pay damages to the Williamsons. If it chose not to do so, it would suffer no adverse consequences. If a future passenger was

injured and brought suit, the verdict in the Williamsons' favor here would have no impact on such a future lawsuit. That future plaintiff would be required to prove the same elements of a product liability cause of action that the Williamsons must prove.

Mere financial incentive to undertake some action is not the type of state mandatory requirement that the doctrine of federal preemption addresses. Preemption is concerned with the exercise of governmental power, not governmental persuasion.[4]

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[4] The statement in *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959), that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief," makes no distinction between direct and indirect regulatory impact and so has little relevance to preemption outside the labor law context.

Garmon reversed an award of damages to an employer for loss of business due to union picketing. The Court ruled that with respect to such activities, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *Id.* at 245. As this Court later explained, *Garmon* was chiefly concerned with "ensuring that primary responsibility for interpreting and applying this body of labor law remain[ed] with the NLRB." *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 502 (1984). Thus *Garmon* involved the ouster of both federal and state courts from any regulation of certain labor activities, whether direct or indirect.

It is also significant that the *Garmon* Court carefully conditioned its preemption of state tort liability on the provision of alternative federal remedies. 359 U.S. at 243. Justice Harlan, concurring, cautioned that, where Congress has not provided such a remedy, "there is no ground for concluding that . . .

For example, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), involved a state statute that imposed surcharges on patient hospital bills paid by non-Blue Cross/Blue Shield providers. Commercial insurers argued that the statute was a preempted regulation of their ERISA plans because the law's effect was to make their insurance relatively more expensive. This Court held that the "indirect economic influence" of the surcharge did not "bind plan administrators to any particular choice" and so did not "function as a regulation of an ERISA plan itself." 514 U.S. at 659. *See also California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997) (state law resulting in financial incentive for employers to meet state apprenticeship requirements did not amount to regulation of ERISA program). Similarly, a financial incentive for companies to avoid future liability by exercising due care in the design of their products is not an exercise of state power in competition with mandatory federal regulation.

The fact that Mazda may choose not to change its design, even if a jury returns a verdict in the Williamsons' favor in this case, distinguishes tort liability from a mandatory regulation. The Court in *Geier* acknowledged some inconsistency in prior cases, some of which simply "*assume*[d] compliance with the state-law duty in question" by altering the design of its product. 529 U.S. at 882 (emphasis in

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[state] liabilities for tortious conduct have been eliminated." *Id.* at 252 (Harlan, J., concurring) (quoting *United Constr. Workers, Affiliated with United Mine Workers of Am. v. Laburnum Const Co.*, 347 U.S. 656, 665 (1954)).

original). The *Geier* Court found it unnecessary to resolve such differences. *Id.* However, the Court subsequently took up that question and clarified this important distinction:

> An occurrence that merely motivates an optional decision does not qualify as a requirement. The Court of Appeals was therefore quite wrong when it assumed that any event, such as a jury verdict, that might "induce" a pesticide manufacturer to change its label should be viewed as a requirement. . . .
>
> A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement.

Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 443-45 (2005).

B. State Tort Remedies for Personal Injury Do Not Conflict with Federal Safety Standards and Requirements, but Are Complementary

Not only is tort liability not an obstacle to congressional purposes in enacting safety statutes, tort remedies complement administrative regulatory action in accomplishing those purposes.

Congress places the administrative regulatory apparatus in the hands of imperfect human beings, operating under a variety of external pressures and with limited resources. *See e.g.*, Institute of

Medicine, *The Future of Drug Safety: Promoting and Protecting the Health of the Public* 193-94 (Alina Baciu, Kathleen Stratton & Sheila P. Burke eds., 2006) (warning that the FDA "lacks the resources needed to accomplish its large and complex mission").

It should be no surprise, then, that federal safety regulation is an imperfect system. Automobiles with life-threatening design flaws—from the dangerous Ford Pinto fuel system to the recent Toyota unexpected acceleration problems—have caused mayhem on our highways, despite compliance with all applicable safety standards. *See* Jeff Wigington, *The Best-Selling Defect in America*, 39 Trial 62, 64 (July 2003) (noting the "laundry list of defective products that also met federal standards yet are known to kill people—such as the Ford Pinto and certain Firestone tires").

This is not a shortcoming unique to NHTSA. For example, most failure-to-warn prescription drug cases involve "risks that emerged after the drugs were approved by the FDA and were available to the public." Michael D. Green, *Safety As an Element of Pharmaceutical Quality: the Respective Roles of Regulation and Tort Law*, 42 St. Louis U. L.J. 163, 169 (1998); *see also* United States General Accounting Office, *FDA Drug Review: Post-Approval Risks 1976-85* 3 (1990) (over half of approved drugs had serious risks not detected until after FDA approval); Alastair J.J. Wood, *The Safety of New Medicines: The Importance of Asking the Right Questions*, 281 JAMA 1753, 1753 (1999) (discussing five drugs withdrawn from the market for safety reasons and stating that "a staggering 19.8 million

patients . . . were estimated to have been exposed to these 5 drugs before their removal").[5]

It is true that administrative agencies are able to draw upon scientific expertise in formulating safety standards, but they are not clairvoyant. A jury has the advantage of viewing the performance of a product retrospectively. Moreover, agencies lack the resources to comprehensively monitor post-marketing events involving the products they regulate. Consequently, it has long been true, as former FDA Commissioner David Kessler has written, that "tort law often informs regulatory decisions, and the FDA has often acted in response to information that has come to light in state damages litigation." David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims*, 96 Geo. L.J. 461, 477 (2007-2008); *see also* Aaron S. Kesselheim & Jerry Avorn, *The Role of Litigation in Defining Drug Risks*, 297 JAMA 308, 308 (2007) ("In both the premarketing and postmarketing stages, lawsuits have helped uncover important and previously unavailable data about major adverse events."); Catherine T. Struve, *The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation*, 5 Yale J. Health Pol'y L. & Ethics 587, 612 (2005) ("The tort system should remain free to redetermine product safety in the light of information developed during litigation, because the

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[5] As Justice Stevens noted, "the Titanic 'complied with British governmental regulations setting minimum requirements for lifeboats when it left port on its final, fateful voyage'" *Geier*, 529 U.S. at 903 n.19 (Stevens, J., dissenting) (quoting Nader & Page, *supra*, at 459).

FDA may not always uncover relevant safety information and may not act quickly enough upon the information that it does receive.").

This Court has recognized that the two prongs of America's approach to product safety—regulation and liability—are complementary and not mutually exclusive. *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 668 (1993) (State "negligence liability could just as easily complement" railroad crossing regulations under the Federal Railroad Safety Act); *Bates*, 544 U.S. at 451 (tort actions "may aid in the exposure of new dangers associated" with the product and prompt the agency to "decide that revised labels are required in light of the new information that has been brought to its attention." Thus private remedies "would seem to aid, rather than hinder, the functioning of [regulation of pesticide labels]"; *Silkwood*, 464 U.S. at 264 (Blackmun, J., dissenting) (Tort damages "complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme."), *see also Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968) ("It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability.").

To hold that state tort liability actions are preempted as conflicting with federal safety regulation is to declare that America will henceforth rely solely on administrative regulation to assure safe consumer and workplace products. The federal government's safety agencies are not so omniscient, omnipotent, or immune from improper influence to justify such a drastic move.

C. State Tort Remedies Are Not an Obstacle to Congress's Goal in Setting Minimum Federal Motor Vehicle Safety Standards.

The lower court incorrectly assumed, without elaboration, that plaintiffs' cause of action necessarily conflicted with the purposes of Congress. Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 49 U.S.C. § 30101 et seq. "to reduce traffic accidents and deaths and injuries resulting from traffic accidents" in part, by "prescrib[ing] motor vehicle safety standards for motor vehicles and motor vehicle equipment." *Id.* The standard at issue here is Federal Motor Vehicle Safety Standard 208, which seeks "to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements . . . [and] equipment requirements for active and passive restraint systems." 49 C.F.R. § 571.208, S2 (1998). At the time the 1993 Mazda MPV Minivan in this case was manufactured, FMVSS 208 provided that Mazda could equip it with either a lap-only or lap-shoulder type seat belt. Mazda opted to equip the vehicle with the lap belt.

The court below offered no explanation how permitting plaintiffs to seek compensatory damages for the death of Thanh Williamson would defeat Congress's purpose. The Type 2, or lap-shoulder belt is significantly and indisputably safer, particularly for children. A recent study carried out with NHTSA support, found that among the children in the study who were seated in the rear-center seat, "those in vehicles equipped with a lap/shoulder belt are 81% less likely to sustain a serious injury than those

seated in the center rear equipped with a lap-only belt system." Center for Injury Research & Prevention, *Lap/Shoulder Belts in the Center Rear: Occupancy Patterns, Use Patterns, and Performance* (2010); *see also* 1 Nat'l Transp. Safety Bd., *Safety Study: The Performance and Use of Child Restraint Systems, Seatbelts, and Air Bags for Children in Passenger Vehicles* 100-01 (Sept. 1996) ("Abdominal bruising of moderate or worse severity and head injuries were typical of the injuries sustained by the children using lap-only belts. . . . The Safety Board believes that occupants seated in the center rear seat should be afforded the same level of protection as other occupants of the rear seat, who have been afforded lap/shoulder belts since January 1, 1990.). Such a safety improvement was clearly feasible. Indeed, most of the major auto manufacturers voluntarily equipped some models with Type 2 seatbelts in all rear seating positions. James J. Murphy, *Lap-Only Seatbelts Can Cause Injury and Death*, 35 Trial 37 (Nov. 1999).

The Williamsons' causes of action in this case proceed from the states' traditional and historic role in providing remedies for wrongful death and injury. This Court has recognized that such remedies can coexist with federal safety regulation without conflict. In *Silkwood*, for example, this Court found no inconsistency between "vest[ing] the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Silkwood to recover for injuries caused by nuclear hazards." 464 U.S. at 258. "Congress intended to rely solely on federal expertise in setting safety standards, and to rely on . . . juries to remedy whatever injury takes place," *Silkwood*,

464 U.S. at 264. There is no basis for preemption where Congress has "decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Wyeth*, 129 S.Ct. at 1200 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989). *See also Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) ("It would have been perfectly rational for Congress not to pre-empt common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims.").

In this case, this Court need not speculate whether Congress intended to rely on both tort liability and administrative regulation. Congress explicitly declared its intent "to stand by both" by explicitly defining the safety standards established under the Act as "a minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. § 30102(a)(9). Imposing liability on a manufacturer for harm caused by using the less safe seatbelt permitted by the minimum standard clearly does not conflict with Congress's objective of reducing injuries and deaths in traffic accidents. *Cf. Sprietsma*, 537 U.S. at 64 (holding that the express preemption clause of Federal Boat Safety Act, 46 U.S.C. §§ 4301 *et seq.*, did not preempt common law tort claims, arising out of failure to install propeller guards on a boat engine, where the Act authorized the federal agency to establish "minimum safety standards." 46 U.S.C. § 4302(a)(1)).

Nor is there any indication that the congressional purpose underlying the Safety Act would be thwarted if carmakers were faced with an

incentive to install lap/shoulder seatbelts for all rear passengers. Here, as distinguished from the airbag requirement in *Geier*, NHTSA has not taken the position that automakers must be provided with the option of installing Type 1 or Type 2 restraints. Br. of the United States, at 9, 14-15. Rather, the government has consistently maintained that a minimum safety standard provided in a FMVSS, without more, does not conflict with a stricter state requirement. *Id.* at 15.

Congress removed any doubt on this matter in 2002 by enacting Pub. L. 107-318, 116 Stat. 2772, popularly known as "Anton's Law," which mandates the installation of lap/shoulder belts in rear inboard seating positions. NHTSA has promulgated a final rule amending FMVSS 208 to implement this requirement. *See* 69 Fed. Reg. 70904-01 (Dec. 8, 2004). Thus, it can scarcely be argued that the Williamsons' claim that Mazda should have equipped their minivan with a Type 2 seatbelt in the rear center seat is in conflict with Congress's purpose. Congress directed NHTSA to amend FMVSS 208 to impose just such a requirement.

III. BROAD "OBSTACLE" PREEMPTION OF STATE TORT REMEDIES ACTIONS UNDERMINES THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO A REMEDY FOR WRONGFUL INJURY.

A. "Obstacle" Preemption Bars the Fundamental Right to Seek Redress for Wrongful Personal Injury Despite the Absence of Express Congressional Intent.

The Founders were certainly familiar with the bedrock common-law principle: "Every right, when withheld, must have a remedy, and every injury its proper redress." 3 William Blackstone, *Commentaries on the Laws of England* 23, 109 (1765). Justice Powell wrote for this Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), that the drafters of the Due Process Clause intended to give Americans "the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Id.* at 673 (quotation omitted).

Those "essential" rights include those which "Blackstone catalogued among the 'absolute rights of individuals'" protected by the common law. *Id.* at 661. Those Blackstonian rights consist of the rights to personal liberty, personal property, and personal security, including the right against wrongful injury to the person. 1 Blackstone, *Commentaries on the Laws of England* 120-34. Indeed, protection of those absolute rights is "the principal aim of society." *Id.* at 120.

Chief Justice John Marshall, echoing Blackstone, restated this principle for Americans:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Following the adoption of the Fourteenth Amendment, this Court pronounced it "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" under the Due Process Clause of the Fourteenth Amendment. *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

This Court was mindful of this due process right to a remedy as it upheld the constitutionality of workers' compensation laws. In *New York Central R.R. Co. v. White*, 243 U.S. 188, 203 (1917), the Court "doubted whether the state could abolish all rights of action, . . . without setting up something adequate in their stead." *Id.* at 201. The Court squarely addressed this question shortly thereafter in *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 163 (1919), in which an injured worker challenged the elimination of his tort cause of action. The Court responded that the state's mandatory workers' compensation program did not violate due process "when established as a reasonable substitute for the legal measure of duty and responsibility previously existing." *Id.* at 163. *See also Crane v. Hahlo*, 258 U.S. 142, 147 (1922) ("No one has a vested right in any given mode of procedure, and so

long as *a substantial and efficient remedy remains or is provided* due process of law is not denied by a legislative change.") (emphasis added).

More recently, the Court was presented with a similar issue in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). The Price-Anderson Act eliminated the common law right of action against owners of nuclear power plants for harm resulting from a nuclear accident. In its place, the Act established a fund and a procedure to satisfy such claims. The Court upheld the Act's constitutionality, noting the "panoply of remedies and guarantees" provided by Congress, *id.* at 93, and concluding that "the Price Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces." *Id.* at 88.

The Court need not in this case restate the limits of congressional power in this respect. Congress did not expressly preempt state tort actions, *Geier*, at 868, and, indeed, has provided that compliance with a federal motor vehicle safety standard "does not exempt a person from liability at common law." 49 U.S.C. § 30103(e).

Instead, this Court is asked to hold that Congress eliminated this important and protected right without a word of explanation or acknowledgment.

This Court has instructed that it presumes Congress is "'familiar with common-law principles . . . recognized in ordinary tort litigation, and . . . likely intended these common-law principles to obtain, absent specific provisions to the contrary.'" *Will v.*

Michigan Dept. of State Police, 491 U.S. 58, 67 (1989) (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)). Congress, of course, knows how to preempt state common law claims expressly as it has demonstrated a number of times "with drastic clarity." *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (Frankfurter, J., concurring); *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989) ("Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires," citing examples).

Given the importance of Americans' right to seek legal redress for wrongful injury, this Court has observed, it would be "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood*, 464 U.S. at 251; *see also Laburnum Const. Co.*, 347 U.S. at 663-64 (Where "Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct," the Court refused preemption that would leave the injured respondent "without recourse or compensation."); *cf.*, *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) (finding implied preemption of state nuisance law by the federal Clean Water Act, where the result "does not leave respondents without a remedy").

This Court recently explained that Congress's "silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend [agency] oversight to be the exclusive means of

ensuring drug safety and effectiveness." *Wyeth*, 129 S.Ct. at 1200. As the Fifth Circuit even more recently stated, "the bar to a finding of preemption is set even higher because federal law provides no remedy for an injured consumer." *Demahy v. Actavis, Inc.*, 593 F.3d 428, 435 (5th Cir. 2010). Indeed, to deny an injured family such a fundamental right on the basis of little more than congressional silence and ambiguity would be "spectacularly odd." *Lohr*, 518 U.S. at 491 (plurality opinion).

B. "Obstacle" Preemption Undermines the Role of the States in our Federalist System.

A case involving preemption of state tort remedies is always "'a case about federalism.'" *Geier*, at 887 (Stevens, J., dissenting) (quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991)).

Providing legal recourse for those injured by dangerous products is assigned by the Constitution to the states:

> Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law *or a part of the law of torts*. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (emphasis added).

Preemption of state tort remedies results in "a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for the [plaintiffs'] injuries." *Lohr*, at 488-89. In this fashion, expanded use of implied conflict preemption of state remedies represents a "backdoor federalization" of tort law. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 U.C.L.A. L. Rev. 1353 (2006).

Our system of federalism does "not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). As Justice Powell observed, "by usurping functions traditionally performed by the States, federal overreaching . . . undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties." *Garcia*, 469 U.S. at 572 (Powell, J., dissenting).

This Court in *Garcia* held that the states' sovereignty is "more properly protected by procedural safeguards inherent in the structure of the federal system," by virtue of the States' representation in Congress. *Id.* at 552. The corollary to that proposition is that the States must be assured meaningful opportunity to protect their interests through congressional representation. That structural guarantee of federalism, and of the individual's right to remedies provided under state law, is subverted if courts freely preempt state remedies in the absence of congressional

consideration or expression of intent. As Justice O'Connor has explained:

> [A]s this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.

Gregory v. Ashcroft, 501 U.S. 452, 464 (1991).

Courts should therefore "avoid[] unintended encroachment on the authority of the States," *CSX Transp. Inc.*, 507 U.S. at 663-64, by limiting "obstacle" preemption to those circumstances where the court can be certain that Congress—not the administering federal agency which does not represent the interests of the states—has deemed state law an obstacle to its legislative purpose.

"Obstacle" preemption should no longer serve as a battlefield for business interests seeking immunity from state law obligations to make whole the victims of wrongful conduct. This Court should make clear that state law may be set aside as an "obstacle" to the purposes of Congress only where state law intrudes upon an area of overriding federal interest,[6] or where giving effect to a state law would

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[6] *E.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (federal authority to conduct foreign affairs); *United States v. Locke*, 529 U.S. 89 (2000) (safe design and operation of oil tankers navigating U.S. waters); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (federal immigration law).

make it impossible to accomplish Congress's purpose in enacting the federal statute. State tort remedies for wrongful injury or death rarely, if ever, fall within the scope of such properly bounded "obstacle" preemption where the injured persons would be left with no legal remedy at all

CONCLUSION

For the above reasons, the decision of the court below should be reversed.

Respectfully submitted,

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